

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

ANDREA J MULVIHILL
Claimant

APPEAL NO. 18A-UI-10819-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 09/30/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Dolgencorp, LLC (employer) appealed a representative's October 22, 2018, decision (reference 01) that concluded Andrea Mulvihill (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 19, 2018. The claimant participated personally. The employer was represented by Regina Porter, Hearings Representative, and participated by Scott Graham, District Manager, and Adam Blackburn, Store Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 27, 2007, as a full-time store manager. The claimant signed for receipt of the employer's electronic handbook on April 19, 2018. The handbook contains a drug and alcohol policy or summary.

On September 3, 2018, the claimant was scheduled to work from 1:00 p.m. to 10:30 p.m. At 11:00 a.m. on September 3, 2018, she called a key holder and asked her to cover her shift. The claimant understood she had properly reported her absence. That afternoon while the claimant was driving to the employer's to shop when she went in a ditch with her car. She drove to the employer's parking lot and Mr. Blackburn saw her crying in her car. The claimant said she had an accident and was injured. Mr. Blackburn noticed she was not herself and asked her if she needed assistance. The two talked for a while and then the claimant drove away.

Mr. Blackburn next saw the claimant walking on the street and then again in the employer's break room. Law enforcement questioned the claimant in the employer's break room. Mr. Blackburn was unaware the claimant had reported her absence for the day and thought she was working. Law enforcement suggested to Mr. Blackburn that the claimant might be under the influence of some substance. Mr. Blackburn observed that the claimant was speaking in fragmented sentences. She was also drowsy, belligerent, trembling, and confused. The

claimant talked about working. Based on his observations, law enforcement's suggestion, and a talk with a district manager, the employer decided to transport the claimant to a medical facility to have her drug and alcohol tested.

The claimant had not considered whether Mr. Blackburn thought she was working. She was concerned about her recent accident and injuries. She thought Mr. Blackburn was being a friend and transporting her to the hospital so she could seek treatment. The claimant did not understand she was being drug and alcohol tested. The employer did not send her a copy of the test results. The employer suspended her with pay after the accident. On September 19, 2018, the employer told her that her test was positive for alcohol and she was terminated.

The claimant filed for unemployment insurance benefits with an effective date of September 30, 2018. The employer provided the name and number of Scott Graham as the person who would participate in the fact-finding interview on October 18, 2018 at 1:40 p.m. The fact-finder called Mr. Graham at 1:44 p.m. on October 18, 2018, and 12:36 p.m. on October 19, 2018, but he was not available and the fact-finder was unable to leave a message. Mr. Graham's telephone did not ring by 2:00 p.m. on October 18, 2018, and he called his representative at Equifax, Greg Johner. There was no information that Mr. Johner contacted the fact-finder after Mr. Graham's call on October 18, 2018. The employer provided some documents for the fact-finding interview. The employer did not submit the specific rule or policy that the claimant violated which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or

incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.” *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d at 558.

Iowa Code Section 730.5(6)a provides:

6. Scheduling of tests.

a. Drug or alcohol testing of employees conducted by an employer shall normally occur during, or immediately before or after, a regular work period. The time required for such testing by an employer shall be deemed work time for the purposes of compensation and benefits for employees.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on September 3, 2018. The claimant was not working on this day and yet the employer tested her on September 3, 2018. The employer did not provide any documentation indicating it had the authority to drug and alcohol test employees when they were not working. Drinking alcohol on one's day off is not work-related misconduct. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's October 22, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn